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In The

Supreme Court of the United States

October Term, 1997

CITY OF CINCINNATI; ROXANNE QUALLS, Councilmember and Mayor of the City of Cincinnati; DWIGHT TILLERY, Councilmember; TYRONE YATES, Councilmember; TODD PORTUNE, Councilmember; BOBBIE STERNE, Councilmember; PHILIP M. HEIMLICH, Councilmember; MINETTE J. COOPER, Councilmember; THOMAS A. LUKEN, Councilmember; NICHOLAS J. VEHR, Councilmember; CHARLES WINBURN, Councilmember; JOHN F. SHIREY, City Manager of the City of Cincinnati,

Petitioners,

v.

JOHN R. KRUSE; KRUSE FOR COUNCIL COMMITTEE; THOMAS E. BRINKMAN, JR.; MARK W. MILLER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, consistent with this Court's ruling in *Buckley v. Valeo*, 424 U.S. 1 (1976), states and municipalities may enact campaign spending limits for their elections upon proof of new facts and circumstances not available nor presented to the *Buckley* Court which establish that compelling governmental interests justify the limits.

2. Whether, if the Court of Appeals for the Sixth Circuit correctly read *Buckley* to hold that all campaign spending limits are *per se* unconstitutional, *Buckley* should now be overruled to permit a showing at trial of new facts and circumstances and new compelling governmental interests which justify such limits.

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

In addition to the Petitioners and Respondents as listed in the caption, the following parties participated in the proceedings below:

Defendant-Intervenors Charter Committee of Greater Cincinnati, Hamilton County Democratic Party, and A. Matthew Rosen; and

Defendant-Intervenors African-American Small Business Committee PAC and Barbara Milon.

CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29.6, the Petitioner City of Cincinnati hereby states that it is a municipal corporation. It has no parent company nor does it have any subsidiaries or affiliated corporations.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 142 F.3d 907 (6th Cir. 1998), and is reprinted in the Appendix to this petition at App. 1-32. The opinion of the District Court for the Southern District of Ohio is unpublished and is reprinted at App. 33-49.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered judgment on April 27, 1998 and denied Defendants-Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc on June 18, 1998. App. 50-51. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech . . . "

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . "

City of Cincinnati Ordinance 240-1995 is reprinted in the Appendix at App. 52-56.

STATEMENT OF THE CASE

In July 1995, following twenty months of study and deliberation, the Cincinnati City Council enacted limits on campaign expenditures in city council elections. App. 52-56. The city council set the limits at the level of three times the annual salary for a city councilmember, a level of approximately $140,000.[1] App. 54. The City enacted the limits to address a pervasive public perception of corruption in its local election process and in its local government, a crisis in public confidence fueled by the City's system of unlimited campaign spending.[2] Further, the City enacted the limits to address an increasing threat of actual corruption resulting from the rising costs of city council campaigns.[3] The City's action drew, in part, on the two decades of federal election experience demonstrating that contribution limits alone are insufficient for

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[1] In November 1995, the city council also enacted limits on campaign contributions in city council elections. The contribution limits include a $1,000 limit on individuals and a $2,500 limit on political action committees and campaign committees. City of Cincinnati Ordinance No. 336-1995, amended by Ordinance No. 9-1997.

[2] R.No.38, Exh.1, Statement of Facts, 10-12 ("Statement of Facts"); Exh.4, Affidavit of John D. Deardourff, 1-17 ("Deardourff Aff."). The full record in the District Court will be referred to as "R."

[3] R.No.38, Statement of Facts, 1-5; Exh.3, Affidavit of Larry Makinson, 1-7 ("Makinson Aff.").

addressing the important governmental interest of preventing corruption and the appearance of corruption in the electoral process.[4]

The City also enacted the campaign spending limits to address two new compelling governmental interests. First, the City has an interest in freeing its elected officials from the pressures of fundraising to ensure that they are able to carry out their representative duties without interference.[5] Second, the Cincinnati experience of unlimited campaign spending includes a unique "black-out" phenomenon with respect to television advertising time. City council candidates with large sums of money early in the election season have been able, through excessive television advertising purchases, effectively to preempt other less well-funded candidates from broadcasting their messages on prime-time television in the critical weeks leading to election day. The City's limits address its interest in preventing some city council candidates from blocking other candidates' access to key television advertising time.[6]

In March 1996, Respondent John R. Kruse, an unsuccessful city council candidate, his political committee,

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[4] R.No.38, Exh.7, Affidavit of Bobbie L. Sterne, 4-5 ("Sterne Aff.").

[5] R.No.38, Exh.6, Attachments to Affidavit of Todd B. Portune: Final Report of the Campaign Finance Advisory Board, 4 ("Advisory Board Report"); Report of the League of Women Voters of the Cincinnati Area, 1 ("League of Women Voters Report"); Exh.11, Affidavit of Rev. Kazava Smith, 4 ("Smith Aff.").

[6] R.No.38, Statement of Facts, 13; R.No.37, Affidavit of Jerry Galvin ("Galvin Aff.").

and two financial contributors to Cincinnati city council campaigns filed a complaint in the U.S. District Court for the Southern District of Ohio, alleging that Cincinnati's campaign spending limits ordinance violated their First and Fourteenth Amendment rights. Respondents named as defendants (Petitioners) the City of Cincinnati, the mayor, each of the nine councilmembers, and the city manager. R.No.3, Respondents' Amended Complaint.

A. Statement Of Facts

The Cincinnati city council's vote in July 1995 approving Ordinance 240-1995 marked a culmination of more than twenty months of legislative debate and citizen input. The record demonstrates that the city council enacted the campaign spending limits to address its interest in preventing corruption and the appearance of corruption in the local election process; in freeing its elected officials from the pressures of fundraising so as to ensure that they are able to carry out their representative duties without interference; and in preventing some city council candidates from blocking other candidates' access to key television advertising time.[7]

In the district court proceedings, the City of Cincinnati, in its opposition to Respondents' motion for summary judgment, presented a factual record demonstrating new facts and circumstances which justify the City's campaign spending limits and which warrant a trial at which

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[7] R.No.38, Statement of Facts; Deardourff Aff.; Makinson Aff.; Advisory Board Report; League of Women Voters Report; Smith Aff.; R.No.37, Galvin Aff.

the district court could properly weigh the evidence demonstrating the necessity of the limits. This record includes the following facts:

- In the past several election cycles, the City of Cincinnati has witnessed a dramatic rise in the cost of Cincinnati city council campaigns. The highest candidate expenditure for a winning campaign has increased by more than 480 percent, rising from $75,000 in 1989 to $362,000 in 1995. R.No.38, Makinson Aff., 4.

- The rise in the overall cost of Cincinnati city council races has caused a corresponding rise in the influence of wealthy donors in Cincinnati's elections. From 1991 to 1995, one-third of one percent of the metropolitan area's population provided more than $3.9 million in campaign contributions to city council candidates, amounting to nearly 70% of all the money raised by those candidates. *Id.* at 6-7.

- The public perception in Cincinnati, shared by an overwhelming majority of Cincinnati residents, is that "large campaign contributors wield undue influence on the political system." That same overwhelming majority state that "[t]he amount of money in election campaigns has caused [them] to lose a great deal of faith in the political system." Cincinnati residents "firmly believe that their own and others' level of trust in the integrity of the political system has been eroded by the

amount of money in politics." R.No.38, Deardourff Aff., 7, 9-10.[8]

- The rising costs of Cincinnati's city council campaigns causes city councilmembers to spend increasing amounts of time raising money for the next election, which interferes with their responsibilities for governing the city. This consequence of unlimited campaign spending further fuels the erosion of public confidence in Cincinnati in its local election process and in its local government. *Supra* note 5.

- The system of unlimited campaign spending in Cincinnati city council elections has caused a "black-out" phenomenon with respect to television advertising time. The policy of local television broadcasters in Cincinnati is to sell television advertising spots on a first-come, first-serve basis. Because there is a limited supply of the most valuable advertising spots available on local television, city council candidates with significant quantities of campaign funds early in a campaign season have been able to preempt effectively the right of other, less well-

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[8] An overwhelming majority of Cincinnati residents further believe that unlimited campaign spending: 1) discourages potential candidates from running for public office, thereby narrowing the range of choices available to voters; 2) prevents the electorate from hearing some campaign messages among candidates who do run, thus depriving voters of information relevant to their voting decisions; and 3) discourages people from voting and participating in the political process. R.No.38, Deardourff Aff., 15.

funded candidates to purchase such advertising time. *Supra* note 6.

- Candidates for Cincinnati city council can run a viable campaign spending less than $140,000, the limit set in Cincinnati Ordinance 240-1995. Of the nine winning Cincinnati city council candidates in the 1995 elections, four won election spending less than $140,000, including one who spent only $33,000 and a challenger candidate who spent $97,000. R.No.38, Statement of Facts, 12.

B. The Lower Court Decisions

(1) The District Court Ruling

Respondents filed a motion for summary judgment on July 5, 1996, arguing that Cincinnati's campaign spending limits are *per se* unconstitutional under *Buckley v. Valeo*, 424 U.S. 1 (1976).

At a November 18, 1996 scheduling conference, all parties jointly stipulated to a preliminary injunction which enjoined enforcement of the ordinance during the litigation.[9] In urging a decision on summary judgment, the Respondents agreed to stipulate that any and all facts

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[9] In addition to the Petitioners City of Cincinnati, et al. and the Respondents, the parties included two sets of defendant-intervenors: the Charter Committee of Greater Cincinnati, the Hamilton County Democratic Party, and a former city council candidate; and the African American Small Business PAC and a former city council candidate.

set forth by the City in defense of its ordinance are true for the purposes of its motion for summary judgment.[10]

At the close of oral argument on January 31, 1997, the District Court issued an oral opinion and final judgment granting the Respondents' motion for summary judgment and declaring the City's ordinance unconstitutional under *Buckley*. App. 33-49. The Court stated, however, its belief that the ordinance's $140,000 limit is "more than reasonable" for a Cincinnati city council election. App. 39.

(2) The Sixth Circuit Ruling

The Petitioners appealed the District Court's ruling to the United States Court of Appeals for the Sixth Circuit. The City of Cincinnati emphasized in its appeal, as it did before the district court, that it seeks only the opportunity to prove at trial that its campaign spending limits are necessary to address its compelling governmental

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[10] Counsel for Respondents informed the district court at the November 18, 1996 scheduling conference that "[w]e want you to presume that at trial [the City of Cincinnati] can prove x at trial and [the City of Cincinnati] can prove y and at trial [the City of Cincinnati] can prove z. And [the City of Cincinnati] can make that list as long as [it] wants. [The City of Cincinnati] can say anything [it] wants if [it] thinks [it] can prove it at trial. For purposes of our motion for summary judgment, we want you to presume that every fact that [the City of Cincinnati] says that [it] can prove, that [it] in fact will prove at trial." R.No.38, Exh.2.

interests.[11] On April 27, 1998, a three-judge panel of the Sixth Circuit denied the City that opportunity and affirmed the District Court's ruling. App. 1-32.

A majority of the Sixth Circuit panel held that, under this Court's decisions in *Buckley, Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985) ("*NC-PAC*") and *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 116 S. Ct. 2309 (1996) ("*Colorado Republican*"), Cincinnati's campaign spending limits are *per se* unconstitutional. App. 18-20. Further, the panel ruled that, were it to consider the factual record, the City did not demonstrate that campaign spending limits are necessary to address the compelling governmental interest of preventing corruption and the appearance of corruption in the electoral process. App. 20. The panel held that Cincinnati could not rely on the twenty-two years of federal election experience with contribution limits to demonstrate that such limits working alone are insufficient for addressing that interest. *Id.* The panel stated its view — unsupported by

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[11] The standard for review of a motion for summary judgment is well-settled. As this Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986):

> A case is ripe for summary judgment when there exists no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact is present if the evidence is such that a reasonable jury could return a verdict for the non-moving party . . . In reaching its conclusion, the court must resolve all significant doubt over factual issues, if any, in favor of the non-movant and draw all reasonable inferences against the moving party's motion.

the facts in the record — that the ineffectiveness of contribution limits in federal elections is "explained primarily by the 'soft-money' loophole." App. 20-21 (citing Note, *Soft Money: The Current Rules and the Case for Reform,* 111 Harv. L. Rev. 1323 (1998)).

The panel also held that Cincinnati could not go to trial to prove that its campaign spending limits are justified by a new and compelling governmental interest in freeing the City's elected officials from the pressures of fundraising. App. 22-23. The panel admitted that the time a candidate must spend raising money for her campaign "detracts an officeholder from doing her job," App. 23, but it nonetheless ruled that the interest in reducing the time elected officials spend on fundraising "cannot serve as a basis for limiting campaign spending." *Id.*

The panel's opinion does not address the City's argument that its campaign spending limits are also justified by a new and compelling governmental interest in preventing some city council candidates from blocking other candidates' access to key television advertising time.

U.S. District Judge Avern Cohn[12] issued a concurring opinion. App. 29-32. While joining the majority's affirmance of the District Court's ruling, Judge Cohn disagreed with the majority's reading of *Buckley* with respect to campaign spending limits: "The Supreme Court's decision in *Buckley* . . . is not a broad pronouncement declaring all campaign expenditure limits unconstitutional." App. 31-32.

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[12] United States District Judge for the Eastern District of Michigan, sitting by designation.

REASONS FOR GRANTING THE WRIT

This case is of the utmost importance to the nation and to the state of American democracy. In the twenty-two years since this Court's ruling in *Buckley v. Valeo*, the United States has witnessed an explosion of campaign spending in federal elections, with the 1996 election cycle marking the most expensive election yet in U.S. history.[13] Campaign spending has also dramatically risen in state and local elections across the country.[14] This unlimited spending has seriously undermined public confidence in our electoral process and in our democratic institutions.[15] It has presented an increased threat of actual corruption as large contributors dominate the financing of public election campaigns.[16] It has placed enormous time pressures on officeholders running for re-election, interfering with their ability to carry out their governing duties.[17]

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[13] Ruth Marcus & Charles Babcock, "The System Cracks Under Weight of Cash; Candidates, Parties and Outside Interests Dropped a Record $2.7 Billion," *The Washington Post*, February 9, 1997, A1 ("Marcus and Babcock").

[14] Kevin Sack, "High Stakes and Higher Antes in Statehouse Races," *The New York Times*, September 6, 1998, A1.

[15] Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our American Democracy*, 94 Colum. L. Rev. 1126-1131 (1994).

[16] *Id.* at 1131-1142; Jamin Raskin and John Bonifaz, *Equal Protection and the Wealth Primary*, 11 Yale L. & Pol'y Rev. 273, 293-297, 326-328 (1993) ("Raskin and Bonifaz"); Charles Lewis and The Center for Public Integrity, *The Buying of the Congress* (1998).

[17] Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281 (1994).

At issue in this case is whether states and municipalities, in the face of new facts and circumstances associated with unlimited campaign spending, may employ reasonable campaign spending limits to protect the integrity of their elections and their governments. Like the Petitioner City of Cincinnati, other jurisdictions have applied this remedy to address the dangers resulting from unlimited campaign spending. Last year, the State of Vermont enacted campaign spending limits for its state elections, to take effect in the 2000 election cycle.[18] Since 1974, the City of Albuquerque has maintained limits on campaign expenditures for its local elections.[19] In July 1995, the Supreme Court of Ohio revised its judicial code of ethics to set campaign spending limits for that state's judicial elections.[20]

The Sixth Circuit's ruling endangers the ability of states and municipalities to respond to serious threats to their democratic processes.[21] Under this ruling, no set of

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[18] Vt. Stat. Ann. 17, § 2805a (effective November 4, 1998).

[19] Albuquerque, N.M. Charter, art. XIII, Election Code, § 4.

[20] Supreme Court of Ohio Code of Judicial Conduct, Canon VII(C)(6). The Sixth Circuit recently affirmed a district court ruling invalidating the judicial campaign spending limits on First Amendment grounds. *Suster v. Marshall*, 1998 U.S.App. LEXIS 17445. The Sixth Circuit held that, according to *Buckley*, campaign finance regulation can only be justified by the compelling governmental interest of preventing corruption and the appearance of corruption in the electoral process. The panel thus rejected the state supreme court's defense of its spending limits as justified by a new compelling governmental interest in protecting the impartiality and the appearance of impartiality of the state judiciary. *Id.* at *27.

[21] The United States Congress has also demonstrated interest in employing campaign spending limits for federal

facts can ever be proved which would demonstrate the necessity for campaign spending limits. Under this ruling, no new and compelling governmental interests can ever be considered that might justify campaign spending limits.

The Sixth Circuit's ruling conflicts with *Buckley*. This Court in *Buckley* did not close the door to proof of any and all new facts and circumstances and any and all new compelling governmental interests which would justify campaign spending limits. *Buckley*, 424 U.S. at 55-56. This case presents new facts and circumstances demonstrating that contribution limits alone have proven insufficient for addressing the compelling governmental interest of preventing corruption and the appearance of corruption in the electoral process. This case also presents new and compelling governmental interests which justify campaign spending limits.

In the alternative, if *Buckley* did hold that campaign spending limits are *per se* unconstitutional, this Court should now revisit that ruling. The facts do matter. A ruling forever closing the door to the lessons of governmental experience with unlimited campaign spending runs contrary to the constitutional responsibilities of this Court. As this Court stated in *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992):

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elections. Members of Congress have introduced campaign spending limit bills eleven times since this Court's ruling in *Buckley*. S.1684 and S.1185 (98th Congress); S.59 (99th Congress); H.R.2473 (100th Congress); H.R.1456 (101st Congress); H.Res. 168 and H.R.3571 (103rd Congress); H.R.3651 and H.R.3658 (104th Congress); and S.1057 and H.R.77 (105th Congress).

> In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty.

This Court should grant the petition for certiorari to correct the Sixth Circuit's erroneous reading of *Buckley* and to resolve the critical question of whether state and local governments can ever determine that campaign spending limits are necessary to address serious threats to the democratic process.

I. THE RULING BELOW CONFLICTS WITH *BUCKLEY V. VALEO*

A. This Court in *Buckley* Did Not Hold That No New Facts and Circumstances Could Ever Be Proved Which Would Demonstrate the Necessity for Campaign Spending Limits

In *Buckley*, this Court upheld congressional limits on campaign contributions in federal elections as justified by the sufficiently important governmental interests of preventing corruption and the appearance of corruption. *Buckley*, 424 U.S. at 23-38. In assessing the constitutionality of congressional limits on campaign expenditures in federal elections, this Court found, on the record before it, that the contribution limits alone would be sufficient for addressing such governmental interests. While the appellate court had ruled that "the expenditure

restrictions are necessary to reduce the incentive to circumvent direct contribution limits,"[22] this Court found:

> There is no indication [in the record] that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussion of such violations will be insufficient to police the contribution provisions. *Buckley*, 424 U.S. at 55-56.

This pivotal passage from *Buckley* unambiguously reveals that a key empirical judgment — drawn from the record — ultimately determined the constitutionality of the congressional campaign spending limits. For what if the record in *Buckley* had established that the "substantial criminal penalties" and the "political repercussion" were not sufficient to "police the contribution provisions"? Clearly, *Buckley* leaves the door open for a different factual record which would justify the need for campaign spending limits.

The Sixth Circuit panel's opinion misreads this crucial aspect of the *Buckley* ruling. It also misapplies this Court's holdings in *NC-PAC* and in *Colorado Republican* to this case. The panel states:

> We are not unaware of the excesses of the federal campaign system. However, to the extent the City is relying on its interest in preventing real and perceived quid pro quo corruption, the Supreme Court's decisions in *Buckley*, *NC-PAC* and *Colorado Republican* clearly foreclose this argument as a matter of law. App. 18-19.

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[22] *Buckley*, 519 F.2d 817, 859 (D.C. Cir. 1975).

As demonstrated above, the argument that campaign spending limits are a necessary concomitant to contribution limits was rejected by the *Buckley* Court only as a *matter of fact*. There is no other way of reading the Court's pivotal passage on this point. Further, *NC-PAC* and *Colorado Republican* address spending limits on *independent expenditures* by political action committees and by political parties, *not* spending limits on expenditures by and coordinated with candidate campaigns. This case is the first case since *Buckley* to raise the question of spending limits on campaign expenditures by candidates. Even if *NC-PAC* and *Colorado Republican* were to be interpreted as foreclosing such an argument as a matter of law with respect to limits on independent expenditures by PACs and by political parties,[23] the factually contingent nature of this Court's ruling in *Buckley* on spending limits on campaign expenditures would not change.

Further, this Court decided *Buckley* on a limited factual record, a consequence of a provision for expedited judicial review included in the 1974 amendments to the Federal Election Campaign Act. 2 USC § 437h. That provision effectively precluded any possibility for trial and,

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[23] The panel's own citation to *Colorado Republican* demonstrates the factually contingent nature of the Supreme Court's ruling in that case: "As the Court reasoned in *Colorado Republican*, 'the lack of coordination between the candidate and the source of the expenditure . . . prevents us from assuming, *absent convincing evidence to the contrary*, that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption in the electoral system.' " App. 19, quoting *Colorado Republican*, 116 S. Ct. at 2316-17 (emphasis added).

therefore, the summary judgment standard was not applicable in *Buckley*. The record in this case, at this summary judgment stage, is different. It presents new facts and circumstances which demonstrate the necessity for campaign spending limits to address Cincinnati's interest in preventing corruption and the appearance of corruption in the electoral process.

The City's expert, John Deardourff, a public opinion researcher with more than 30 years of experience, testified in his affidavit to a pervasive public perception of corruption in Cincinnati with respect to the city council election process. R.No.38, Deardourff Aff. The City demonstrated, through Mr. Deardourff's testimony, that this crisis in public confidence in Cincinnati with respect to the political system is directly tied to unlimited campaign spending.[24]

In holding that the congressional limits on campaign contributions were justified by Congress' interest in preventing corruption and the appearance of corruption, the *Buckley* Court specifically cited the dangers associated with public perception of corruption. This Court held that

> Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to

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[24] Cincinnati residents "firmly believe that their own and others' level of trust in the integrity of the political system has been eroded by the amount of money in politics." R.No.38, Deardourff Aff., 9. An overwhelming majority of Cincinnati residents agree with the statement, "The amount of money in election campaigns has caused me to lose a great deal of faith in the political system." *Id.* at 10.

> be eroded to a disastrous extent.' " *Buckley*, 424 U.S. at 27, citing *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973).

The expert evidence in this record demonstrates that public confidence in the system of representative government in Cincinnati has been "eroded to a disastrous extent," and that contribution limits alone are insufficient to address this public perception of corruption.

The City has also presented crucial expert testimony that "the rise in the overall cost of city council races *has caused* a rise in the influence of wealthy donors in the City's elections, with such donors increasingly dominating the campaign fundraising process." R.No.38, Makinson Aff., 6-7 (emphasis added). From 1991 to 1995, one-third of one percent of the metropolitan area's population provided more than $3.9 million in campaign contributions to city council candidates, amounting to nearly 70% of all the money raised by those candidates. *Id.* at 6. The *Buckley* Court did not hear this critical evidence linking unlimited campaign spending with a corresponding rise in the influence of wealthy donors in elections.

Like Cincinnati, the nation as a whole has witnessed the harmful impact of unlimited campaign spending in elections. In the twenty-two years since *Buckley*, the federal election experience has demonstrated that contribution limits will not, alone, sufficiently address the problem of corruption and the appearance of corruption in the electoral process. The federal experience teaches that, in a system of campaign contribution limits but unlimited campaign spending, large campaign donors will often bundle their contributions, leading to undue

influence on the electoral and legislative processes.[25] Further, the fear that an opponent will spend vast sums of money in pursuit of a campaign victory has fueled a never-ending set of schemes to evade the federal limits. During the most recent federal election, limits on contributions were rendered meaningless by the pressure of increasing levels of spending. The result was a campaign finance system characterized by monied interest contributions in the millions of dollars.[26]

The Sixth Circuit panel held that Cincinnati could not rely upon this federal election experience with contribution limits to bolster its studied conclusion that contribution limits alone are ineffective to prevent corruption and the appearance of corruption. The panel stated: "The City mistakenly relies on the federal experience in national elections with contribution limitations to support its contention that they will inevitably prove inadequate at the local level." App. 20.

The Sixth Circuit's ruling runs counter to the very essence of the governing process. As this Court held in *Renton v. Playtime Theatres, Inc.*, 474 U.S. 41, 51-52 (1986), cities may rely on the experiences of other jurisdictions in

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[25] Raskin and Bonifaz, 326-327 (citing Larry Makinson, *Open Secrets: The Encyclopedia of Congressional Money & Politics* (2d ed. 1992)).

[26] *See* Marcus & Babcock; and Brian McGrory, et al., "Dawn to Dark/Chasing the Dollars: One Day on the Fundraising Trail," *The Boston Globe*, May 16, 1997, A1, A12, quoting U.S. Senator Robert Byrd of West Virginia in a March 1997 Senate floor speech: "The incessant money chase that permeates every crevice of our political system is like an unending circular marathon. And it is a race that sends a clear message to the people: that it is money, money, money that reigns supreme in American politics."

the development and enactment of new laws. Cincinnati need not repeat a failed experiment in order to demonstrate that it is a failure. "To insist that governmental interests justifying such legislation could only be found in specific local experiences and conditions would be unrealistically to require deliberate subjection to those experiences and conditions before attempting to avoid them." *Wall Distributors, Inc. v. The City of Newport News, Virginia*, 782 F.2d 1165, 1169 n.7 (4th Cir. 1986).[27]

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[27] The Sixth Circuit compounds its error by seeking to explain the ineffectiveness of contribution limits in federal elections as resulting from the "soft-money" loophole. App. 20-21, citing Note, *Soft Money: The Current Rules and the Case for Reform*, 111 Harv. L. Rev. 1323 (1998). This claim is completely unsupported by the record in this case. It is a well-settled principle of law that, with the exception of judicially noticed facts, courts must rely only upon the record presented in making their decisions. *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481, 489 n.3 (1986).

Further, this analysis of the federal experience is wrong. "Soft money" is money raised by political parties in unlimited amounts for non-federal election purposes. Federal law prohibits the use of soft money to directly influence a federal campaign, "except when used in the limited, party-building activities specifically designated in the statute." *Colorado Republican*, 116 S.Ct. at 2313, citing 2 U.S.C. § 431(8)(B). While the abuses with the soft-money loophole are indeed significant and the current subject of national debate, they do not explain the insufficiency of contribution limits in federal candidate campaigns. Rather, as the City and the amici states have emphasized, large campaign donors, in a system of unlimited campaign spending, will often seek to evade contribution limits through the bundling of contributions.

The fact that the Sixth Circuit panel's view here is unsupported by the record only highlights why this case must go to trial for a proper weighing of the evidence.

With the new facts and circumstances in this record, Cincinnati clearly demonstrated its right to go to trial to prove that its campaign spending limits are necessary to address the compelling governmental interest of preventing corruption and the appearance of corruption in the electoral process. The Sixth Circuit ruling closing the door on this evidence should be reviewed by this Court.

B. This Court in *Buckley* Did Not Hold That No New and Compelling Governmental Interests Could Ever Be Presented Which Would Justify Campaign Spending Limits

This Court in *Buckley* did not hold that there could never be a new and compelling governmental interest that would justify campaign spending limits. Rather, this Court stated: "No governmental interest *that has been suggested* is sufficient to justify [the congressional campaign spending limits]." *Buckley*, 424 U.S. at 55 (emphasis added). The implication is clear. The door remains open to compelling governmental interests that were *not* suggested to the *Buckley* Court. This Court reaffirmed that point in *NC-PAC*, stating that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests *thus far* identified for restricting campaign finances." *NC-PAC*, 470 U.S. at 496-497 (emphasis added).

Cincinnati has presented two new and compelling governmental interests which justify its campaign spending limits. First, the City has an interest in freeing its elected officials from the pressures of fundraising to

ensure that they are able to carry out their representative duties without interference.

The increasing amount of time elected officials in Cincinnati spend raising money for their campaigns has fueled the erosion of public confidence in the democratic process. As the City's Campaign Finance Advisory Board found in its final report to the Cincinnati city council, the time candidates spend raising money is directly tied to the rising costs of city council campaigns. R.No.38, Advisory Board Report, 4. This new fact associated with unlimited campaign spending has a real and detrimental impact on the ability of elected officials to govern and gives rise to a new compelling interest justifying campaign spending limits.[28]

Further, twenty-two years of experience of unlimited campaign spending in federal elections provides added weight to a new compelling governmental interest in preserving the time of elected officials for carrying out their official duties. *See* Blasi at 1281: "Candidates for office spend too much time raising money. This is

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[28] *See* R.No.38, Smith Aff., 4: "[T]he high costs of City Council campaigns today causes our City Councilmembers to spend too much time raising money for the next election, rather than focusing on their responsibilities on governing the city;" R.No.38, League of Women Voters Report, 1: "More time than is reasonable is spent raising money for campaigns, which may interfere with time for governing." *See also* Blasi at 1283: "Legislators and aspirants for legislative office who devote themselves to raising money round-the-clock are not in essence representatives."

scarcely a controversial proposition." (citing sources on the burdens of fundraising in federal elections).[29]

The City has also presented a new and compelling governmental interest in preventing some city council candidates from blocking other candidates' access to key television advertising time. The record in this case identifies a new set of facts which show that, in Cincinnati, city council candidates with large sums of money early in the election season are able effectively to shut out other candidates from broadcasting their messages on prime time television in the critical weeks leading to election day — a black-out phenomenon.[30] The *Buckley* record did not include this crucial evidence.

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[29] *See also* Martin Schram, *Speaking Freely: Former Members of Congress Talk About Money in Politics* 37-46 (1995) (former Members of Congress discuss the enormous pressures of fundraising and its drain on their time for performing their official duties); Dan Clawson et al., *Money Talks: Corporate PACs and Political Influence* 7-8 (1992): "The quest for money is never ending . . . To pay for an average winning campaign, representatives need to raise $3,700 and senators $12,000 during *every week* of their term of office.") (emphasis in original); Philip M. Stern, *Still the Best Congress Money Can Buy* 119 (1992) (quoting former Congressman Bob Edgar, a Pennsylvania Democrat who resigned from the House to avoid another campaign fundraising cycle: "Eighty percent of my time, 80 percent of my staff's time, 80 percent of my events and meetings were fundraisers. Rather than go to a senior center, I would go to a party where I could raise $3,000 or $4,000."); 138 Cong. Rec. S115 (daily ed. Jan. 6, 1987) (statement of U.S. Senator Robert Byrd of West Virginia): "To raise the money, Senators start hosting fund-raisers years before they next will be in an election. They all too often become fund-raisers first, and legislators second."

[30] *Supra* note 6.

As explained in the expert testimony of Jerry Galvin, an advertising executive with 28 years of experience in the creation and production of television advertisements for Cincinnati city council candidates, well-funded city council candidates engage in media campaigns which "have the effect of preempting the right of other less well-funded candidates from purchasing the most valuable advertising spots." R.No.38, Galvin Aff., 4. Candidates in Cincinnati make such excessive television advertising purchases in such a way as to "drown[ ] out" the campaigns of less well-funded candidates. *Id.* at 6. The City's campaign spending limits will break up this "effective monopoly on the most valuable advertising time." *Id.* at 5.

In the related First Amendment area of television broadcasting, this Court recently reaffirmed the governmental interest of promoting the widespread dissemination of information from a multiplicity of sources. *See Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 117 S.Ct. 1174, 1189 (1997) (upholding the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992): "Congress has an independent interest in preserving a multiplicity of broadcasters to ensure that all households have access to information and entertainment on an equal footing with those who subscribe to cable." In the area of elections, Cincinnati surely has at least an equally important interest in preserving candidates' access to a key medium of communication to the voters during a crucial period in the election campaign.[31]

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[31] Cincinnati, of course, would not have the power to address this phenomenon by imposing "fairness" requirements

In his concurrence, Judge Cohn states his disagreement with the majority opinion's reading of *Buckley*. Judge Cohn writes:

> The Supreme Court's decision in *Buckley* . . . is not a broad pronouncement declaring all campaign expenditure limits unconstitutional. It may be possible to develop a factual record to establish that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties, or the interest in preserving faith in our democracy, is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest. App. 31-32.[32]

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directly on the television stations, given the Federal Communications Commission's jurisdiction over regulation of broadcast media.

[32] While Judge Cohn correctly reads *Buckley* to have allowed for proof of new facts and circumstances and new and compelling governmental interests which would justify campaign spending limits, he errs in joining the majority's affirmance of the district court's granting of summary judgment. Judge Cohn points out that *Buckley* was decided on a slender factual record. He then states: "Similarly, although the City here attempted to develop a compelling factual record, it failed to do so." App. 29.

Judge Cohn does not apply the correct standard for summary judgment. Summary judgment can only be granted "when there exists no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Cincinnati presented genuine issues of material fact in this record. These genuine issues of material fact go directly to Judge Cohn's points on "the interest in freeing officeholders from the pressures of fundraising so they can perform their duties" and "the interest in preserving faith in our democracy." App. 31-32. Having made this showing, the City should have

The majority opinion's finding that campaign spending limits are *per se* unconstitutional conflicts with this Court's ruling in *Buckley*. It endangers the ability of state and local governments to address serious threats to their democracies resulting from unlimited campaign spending. It should be reviewed by this Court.

II. IF THE RULING BELOW DOES NOT CONFLICT WITH *BUCKLEY*, THIS COURT SHOULD REVISIT *BUCKLEY* IN LIGHT OF NEW FACTS AND CIRCUMSTANCES ASSOCIATED WITH UNLIMITED CAMPAIGN SPENDING

If *Buckley* does, in fact, stand for the proposition that all campaign spending limits are *per se* unconstitutional, the new facts and circumstances of this case merit this Court's reconsideration of that ruling.

This Court has recognized that a prior holding may require reexamination based on changed circumstances.

> In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty.

Planned Parenthood v. Casey, 505 U.S. 833, 864 (1992). *See also First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978):

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been allowed its opportunity to go to trial to prove its case. It is precisely at trial, not at the summary judgment stage, where the City would be required to develop "a compelling factual record."

> According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. *Id.* at 789-90;

and *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (overruling *Butler v. Thompson*, 341 U.S. 937 (1951 *per curiam*), and *Breedlove v. Suttles*, 302 U.S. 277 (1937), and invalidating a $1.50 poll tax as violative of the Equal Protection Clause):

> [T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change. *Harper*, 383 U.S. at 669 (emphasis in original).

If *Buckley* holds that campaign spending limits are *per se* unconstitutional and thus bars all consideration of newly developed facts, it renders meaningless the process of judicial scrutiny. The facts do matter, even under strict scrutiny analysis. As this Court stated in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995): "[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' " (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980), MARSHALL, J., concurring in judgment).

A survey of this Court's rulings addressing campaign finance regulations since *Buckley* demonstrates the factually-intensive nature associated even with strict scrutiny analysis. For example, in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), this Court applied a factual record developed at trial in upholding a Michigan statute limiting corporate expenditures in state elections. In *Meyer v. Grant*, 486 U.S. 414 (1988), this Court reviewed the evidence presented at trial in striking down a Colorado law prohibiting paid circulators for initiative petitions. In *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182 (1981), this Court, in upholding FECA's limitations on individual contributions to political action committees, stated that the factual record supported the conclusion that the challenged limitations were necessary "to prevent circumvention of the very limitations on contributions upheld in *Buckley*." *Id.* at 197-98.

Strict scrutiny analysis still requires scrutiny. If *Buckley* closed the door — regardless of the facts — to any and all campaign spending limits, this Court should revisit that ruling.[33]

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[33] In the twenty-two years since *Buckley*, the ruling has generated considerable dissent from constitutional scholars. *See* Leslie Wayne, "Scholars Ask Court to Backtrack, Shutting Floodgates on Political Spending," *The New York Times*, November 10, 1996, A30; Ronald Dworkin, "The Curse of American Politics," *New York Review of Books*, October 17, 1996; Roland S. Homet, Jr., *Fact Finding in First Amendment Litigation: The Case of Campaign Finance Reform*, 21 Okla. City U.L. Rev. 97 (1996); Cass R. Sunstein, *Is Free Speech the Enemy of Democracy?*, Boston Rev., (Mar./Apr. 1993); Ray Forrester, *The New*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

DATED: September 15, 1998

Respectfully submitted,

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Constitutional Right to Buy Elections, 69 A.B.A.J. 1078, 1080 (1993); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 Colum L. Rev. 611 (1982). The City of Cincinnati argues that *Buckley* allows for proof of new facts and circumstances and new compelling governmental interests which would justify campaign spending limits, such as the City has presented in this case. If, however, *Buckley* is to be read as declaring all campaign spending limits *per se* unconstitutional, the City shares the view of many constitutional scholars that this Court should overrule *Buckley*.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN R. KRUSE; KRUSE FOR COUNCIL COMMITTEE; THOMAS E. BRINKMAN, JR.; and MARK W. MILLER,	)	Nos. 97-3193/ 3194/ 3210
Plaintiffs-Appellees,	)	
v.	)	
CITY OF CINCINNATI; ROXANNE QUALLS, Councilmember and Mayor of the City of Cincinnati; DWIGHT TILLERY, Councilmember; TYRONE YATES, Councilmember; TODD PORTUNE, Councilmember; BOBBIE STERNE, Councilmember; PHILIP M. HEIMLICH, Councilmember; MINETTE J. COOPER, Councilmember; THOMAS A. LUKEN, Councilmember; NICHOLAS J. VEHR, Councilmember; CHARLES WINBURN, Councilmember; and JOHN F. SHIREY, City Manager of the City of Cincinnati,	)	
Defendants-Appellants (97-3194),	)	
CHARTER COMMITTEE OF GREATER CINCINNATI; HAMILTON COUNTY DEMOCRATIC PARTY; and A. MATTHEW ROSEN,	)	
Intervenor-Defendants-Appellants (97-3193),	)	
AFRICAN-AMERICAN SMALL BUSINESS COMMITTEE, PAC; and BARBARA MILON,	)	
Intervenor-Defendants-Appellants (97-3210).	)	

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 96-00252 – Herman J. Weber, District Judge.

Argued: March 17, 1998

Decided and Filed: April 27, 1998

Before: KENNEDY and SILER, Circuit Judges; COHN, District Judge.*

COUNSEL

ARGUED: Donald J. Mooney, Jr., BENESCH, FRIEDLANDER, COPLAN & ARONOFF, Cincinnati, Ohio, John C. Bonifaz, NATIONAL VOTING RIGHTS INSTITUTE, Boston, Massachusetts, for Appellants. Michael A. Carvin, COOPER, CARVIN & ROSENTHAL, Washington, D.C., for Appellees. **ON BRIEF:** Donald J. Mooney, Jr., BENESCH, FRIEDLANDER, COPLAN & ARONOFF, Cincinnati, Ohio, John C. Bonifaz, NATIONAL VOTING RIGHTS INSTITUTE, Boston, Massachusetts, Karl P. Kadon, III, CITY SOLICITOR'S OFFICE FOR THE CITY OF CINCINNATI, Cincinnati, Ohio, Eric H. Kearney, COHEN, TODD, KITE & STANFORD, Cincinnati, Ohio, for Appellants. Christopher Paul Finney, David R. Langdon, FINNEY, BACON & MUEHLENKAMP, Cincinnati, Ohio, for Appellees. Elizabeth M. Osenbaugh, DEPARTMENT OF JUSTICE, Des Moines, Iowa, Burt Neuborne, BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, et al., New York, New York, for Amici Curiae.

KENNEDY, J., delivered the opinion of the court, in which SILER, J., joined. COHN, D. J. (pp. 26-28), delivered a separate concurring opinion.

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*The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

KENNEDY, Circuit Judge. Defendants and intervenor-defendants appeal the District Court's judgment striking down City of Cincinnati Ordinance 240-1995 which places a $140,000 limit on city council campaign expenditures because it violates the First Amendment. The parties supporting the Ordinance[1] argue that the interests furthered by this campaign expenditure limitation are different in kind and degree from the governmental interests the Supreme Court considered and rejected as constitutionally insufficient in *Buckley v. Valeo*, 424 U.S. 1 (1976), and on that basis urge this Court to distinguish Buckley and uphold the Ordinance. Their characterizations to the contrary notwithstanding, the parties have not presented this Court with governmental interests different than those considered and rejected by the Supreme Court in *Buckley* and its progeny. We will therefore AFFIRM the decision of the District Court.

I. BACKGROUND

After witnessing a steady rise in the cost of running a successful campaign for city council,[2] the Cincinnati City

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[1] In addition to briefs filed by defendants and defendant-intervenors, amicus briefs urging reversal were filed on behalf of the Brennan Center for Justice and by 33 states through their attorneys general or secretaries of state, and the territory of Guam.

[2] In 1987, 25 city council candidates spent a total of $958,999. In 1995, 18 candidates spent a total of $2,330,000. The

Council passed City Ordinance 240-1995 (the "Ordinance"), which places a cap on campaign expenditures.[3] Under the Ordinance, a city council candidate cannot spend more than three times the annual salary of a Cincinnati councilmember, or, approximately $140,000 at the present time. The Ordinance provides in pertinent part:

> WHEREAS, it is the sense of the Council that limitations on campaign expenditures are the most effective means of promoting meaningful campaign reform; now, therefore,
>
> BE IT ORDAINED by the Council of the city of Cincinnati, state of Ohio:
>
> * * *
>
> Sec. 115-3. Expenditure[4] Limits.
>
> The total amount of expenditures made in the election cycle by a candidate or the campaign committee of a candidate for the council

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highest amount spent by a winning candidate increased by 482% from 1989, $75,000, to 1995, $362,000.

[3] By popular vote, the City amended its City Charter to give the City Council authority to enact campaign finance reform measures that differ from state law.

[4] "Expenditure" is defined as:

> the disbursement or use of either a contribution or personal funds of a candidate for the council or his or her immediate family on behalf of or for the benefit of the candidate for the purpose of advocating his or her election to the council or the defeat of his or her opponent. "Expenditure" does not include an independent expenditure, uncompensated volunteer services, or slate cards, sample ballots, or other publications of a political party that identify all of the candidates endorsed by the party in an election.

shall not exceed three times the annual compensation provided for the office to which a candidate seeks election.

The City Council passed the Ordinance despite the legal opinion of the City Solicitor that expenditure limits are unconstitutional under *Buckley*: "As we have previously advised the Council and the Campaign Finance Advisory Board,[5] the U.S. Supreme Court has found expenditure limits to be unconstitutional in the case of *Buckley v. Valeo,* [424 U.S. 1 (1976)]. The holding in this case remains the law on the subject of campaign expenditures and is directly on point as to legislative impositions of such expenditures." A majority of the Campaign Finance Advisory Board also counseled the City against enacting spending limits because of the authority of *Buckley*. Proponents of spending limits however believed that the City "should challenge" the decision and "take the lead on revisiting the Supreme Court's decision" by enacting spending limits.

In November, 1995, the City Council enacted Ordinance No. 336-1995 which placed limits on campaign contributions in city council elections and imposed disclosure requirements in addition to those imposed by state law.[6] The contribution restrictions comprise a $1,000

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[5] The Campaign Finance Advisory Board, composed of a "diverse group of political interests," was created to make recommendations on campaign finance reform in city council elections to the Council.

[6] This ordinance was repealed to make minor amendments; in 1997 a new ordinance was enacted which included the same contribution limitations and disclosure requirements. City of Cincinnati Ordinance No. 9-1997.

limit on individuals; a $2,500 limit on political action committees ("PACs") and campaign committees; and a $10,000 limit on political parties. The City placed no limitation on the amount of personal funds a candidate may contribute to the candidate's own campaign and no limits on independent expenditures.[7]

Plaintiffs John Kruse, a losing candidate in the 1995 city council election who spent more than $140,000 on his campaign; Kruse for Council Committee; Thomas E. Brinkman, a financial contributor to council candidates and potential council candidate; and Mark W. Miller, a financial contributor to council candidates (hereinafter collectively referred to as "Kruse") filed this action challenging the City's spending limit as facially unconstitutional. Kruse sued the City of Cincinnati, the City Manager and members of the City Council in their official capacities (hereinafter collectively referred to as the "City" or "defendants"). The Charter Committee of Greater Cincinnati;[8] the Hamilton County Democratic

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[7] "Independent expenditures" are "communications that in express terms advocate the election or defeat of a clearly identified candidate" and are not controlled or coordinated by that candidate. *Buckley*, 424 U.S. at 43-47.

[8] The Charter Committee originated in the 1920's, a result of the efforts of reformers to "rid Cincinnati of a corrupt political machine that controlled City government through Council members elected by wards and a directly-elected mayor" by creating a Charter system of government. Charter Comm. Br. at 7. Under the Charter system, Cincinnati councilmembers are elected at large on a non-partisan ballot; voters may elect to vote for up to 9 candidates in order of preference. The 9 top vote getters are elected to the Council and the top vote getter is elected mayor. *Id.* at 8.

Party; and A. Matthew Rosen, a former and prospective city council candidate (hereinafter collectively referred to as the "Charter Committee"), intervened on behalf of defendants. The African American Small Business Committee, PAC;[9] and Barbara Milon, an African American candidate for city council in 1993 (hereinafter collectively referred to as "AASBC-PAC"), also intervened on behalf of defendants.

The parties agreed to a preliminary injunction enjoining enforcement of the Ordinance throughout the litigation. Plaintiffs filed their motion for summary judgment on July 5, 1996. Defendants filed their opposition, which set forth the factual basis for the Council's action. Attachments included the results of a study, commissioned by the City, of the impact of money in Cincinnati city council elections. The study was conducted by the Center of Responsive Politics, a non-partisan, non-profit research organization that tracks campaign contributions in U.S. elections. It concluded that "the rise in the overall cost of city council races has caused a corresponding rise in the influence of wealthy donors in the City's elections, with such donors increasingly dominating the campaign financing process . . . and small donors . . . becoming marginal players in that process."

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[9] The African American Small Business Committee, PAC, is a political action committee in Hamilton County, Ohio, which has 2 purposes: "1) to seek, develop, and support candidates in elections in Hamilton County; and 2) to strengthen the influence and profitability of African American owned businesses in the political process." AASBC-PAC Br. at 5 n.2.

Defendants also attached the results of a public opinion survey which gauged the attitude of Cincinnatians on the subject of money in city council elections. The research project, which comprised focus groups and telephone surveys, was conducted by the Deardourff/The Media Company, a planning, consulting, and public opinion research firm. The researchers concluded that an overwhelming majority of residents believe that large contributors wield undue influence on the political system as a whole; that ordinary voters are unable to participate on equal footing in the process; that wealthy candidates unfairly drown out candidates with fewer resources; that the high costs of elections discourage qualified individuals from running for office, which deprives voters of a full choice of candidates; and that overall, money is undermining the fairness and integrity of the political system and causing them to lose faith in the democratic process.

Defendants also attached numerous affidavits from current and former councilmembers concerning the corrupting nature of money in Cincinnati politics and similar statements from groups such as the League of Women Voters and Common Cause. There were also affidavits relating to the ability of candidates to run a meaningful campaign on $140,000.

For purposes of the summary judgment motion, Kruse accepted as true all facts alleged by defendants in their opposition. Kruse argued that under any set of facts proven by defendants, the Ordinance still fails to pass constitutional muster. The District Court agreed and,

under the authority of *Buckley*, held the Ordinance unconstitutional on its face. Defendants and intervenor-defendants filed timely notices of appeal. We have jurisdiction under 28 U.S.C. § 1291. We review a grant of summary judgment *de novo*. *Bush v. Rauch*, 38 F.3d 842, 846 (6th Cir. 1994).

II. DISCUSSION

A. *Buckley* And Its Progeny

"The central holding in *Buckley v. Valeo*, 424 U.S. 1 . . . (1976) (per curiam), is that spending money on one's own speech must be permitted. . . . " *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 116 S. Ct. 2309, 2321 (1996) (Kennedy, J., joined by Rehnquist, C.J. and Scalia, J., concurring in part and dissenting in part) ("*Colo. Republican*")[10] (citing *Buckley*, 424 U.S. at 44-58; *see also*, *Buckley*, 424 U.S. at 266 ("The Court . . . holds that a candidate has a constitutional right to spend unlimited amounts of money . . . in order to be elected.") (White, J., dissenting). Any judicial consideration of the constitutionality of campaign finance reform legislation must begin and usually ends with the comprehensive decision in *Buckley*. The *Buckley* court considered constitutional

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[10] Justice Kennedy's opinion concurred in the judgment reached by the Court, which held that limitations on independent campaign expenditures by political parties violate the First Amendment. *Colo. Republican*, 116 S. Ct. at 2317 (Breyer, J., joined by O'Connor and Souter, JJ.). As explained below, Justice Kennedy would have reached the question of whether *coordinated* party expenditures can be regulated, which Justice Breyer declined to do.

challenges to several sections of the Federal Election Campaign Act of 1971, as amended by the Federal Election Campaign Act Amendments of 1974 (the "Act"). The legislation reformed federal campaign financing by, *inter alia*, placing limits on federal campaign contributions and expenditures. The *Buckley* court drew a general distinction between limitations on campaign contributions, which are constitutionally justified by the compelling state interest of preventing corruption and the appearance of corruption in the electoral process, and limitations on independent campaign expenditures, which are unconstitutional because they cannot be similarly justified. *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 491 (1985) ("NC-PAC ") (generally so describing *Buckley*).

For our present purposes, we are most concerned with what the *Buckley* court had to say about limitations on campaign expenditures and infringement of First Amendment freedoms.

> The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 . . . (1957). Although First Amendment protections are not confined to "the exposition of ideas," *Winters v. New York*, 333 U.S. 507, 510 . . . (1948), "there is practically

> universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. . . . of course includ(ing) discussions of candidates. . . . " *Mills v. Alabama*, 384 U.S. 214, 218 . . . (1966). This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 . . . (1971), "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

Buckley, 424 U.S. at 14-15. The Court, equating spending money with speech, determined that limitations on campaign expenditures directly and acutely impinged upon political expression at the heart of the First Amendment:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Id. at 19.

1. Restrictions On Campaign Spending Will Be Strictly Scrutinized

Because expenditure limitations restrict political expression at the core of the electoral process and the First Amendment, the Court subjected the restrictions to "exacting scrutiny." *Id.* at 39, 44-45. Restrictions so burdening political speech can survive a constitutional attack only if justified by a compelling state interest, *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251-52 (1986) (citing *Buckley*, 424 U.S. at 44-45), and narrowly tailored to serve that interest, *NC-PAC*, 470 U.S. at 496. We reject the City's argument that a standard less rigorous than strict scrutiny should be used to review governmental restrictions of core First Amendment speech. *See, e.g.*, City of Cincinnati Br. at 13 n.2 (*Buckley* court never employed strict scrutiny language). The *Buckley* court explained that it was subjecting the Act's expenditure limitations to "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley*, 424 U.S. at 44-45. Assuming, arguendo, *Buckley* left room for doubt surrounding the appropriate standard of review, the Supreme Court's subsequent cases cited above make clear that strict scrutiny applies. *See also, Colo. Republican*, 116 S. Ct. at 2328 (Thomas, J., dissenting) ("Curbs on protected speech, we have repeatedly said, must be strictly scrutinized.")

Neither is there support for the Charter Committee's contention that states have more latitude than the federal government in regulating the First Amendment expression of its citizens. Indeed, the Supreme Court has stated emphatically to the contrary: "[T]he proposition that the

several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States" is "firmly embedded in our constitutional jurisprudence." *Wallace v. Jaffree*, 472 U.S. 38, 48-49 (1985). The Supreme Court has employed strict scrutiny when considering *state* restrictions on campaign expenditures. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990) ("To determine whether Michigan's restriction on corporate political expenditures may constitutionally be applied to the Chamber, we must ascertain whether it burdens the exercise of political speech and, if it does, whether it is narrowly tailored to serve a compelling state interest."); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) ("The constitutionality of [Massachusetts' restriction of corporate expenditures to influence the outcome of public referendums] turns on whether it can survive exacting scrutiny" which requires showing "closely drawn means" of furthering a "compelling" state interest.).

2. The Supreme Court Has Identified Only One Governmental Interest Supporting Campaign Finance Reform That Survives Strict Scrutiny

Thus far, the Supreme Court has identified only one "legitimate and compelling" governmental interest that justifies restrictions on campaign financing: the prevention of corruption or the appearance of corruption. *NCPAC*, 470 U.S. at 496-97. Corruption is defined as "a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by

the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors." *Id.* at 497. Quid pro quo corruption – both real and perceived – was viewed as a malady so grave as to undermine "the integrity of our system of representative democracy." *Buckley*, 424 U.S. at 26-27. The governmental interest in preventing real and perceived quid pro quo corruption provides a "constitutionally sufficient justification" to sustain limitations on contributions by individuals and groups to candidates and campaign committees. *Id.* at 26-29.[11]

In contrast, the Court found that this interest in preventing corruption and the appearance of corruption in the political system (the "anti-corruption rationale"[12]) is inadequate to sustain limitations on independent expenditures by individuals, *id.* at 45-47, expenditures of a candidate's own money, *id.* at 52-54, and most pertinent to our inquiry, campaign expenditures, *id.* at 55-56. The Court reasoned that spending limitations are not narrowly tailored to preventing corruption because the expenditures at issue did not pose the same potential for abuse as contributions. *Id.* at 46-47; 53; 55. The Court

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[11] As a corollary to this holding, the Court upheld the limitation on contributions by political committees, *Buckley*, 424 U.S. at 35-36, and the limitation on total contributions by any individual during any calendar year, *id.* at 38.

[12] *Colo. Republican*, 116 S. Ct. at 2331 (Thomas, J., dissenting) (citation omitted).

concluded that the Act's contribution limitations and disclosure requirements were the only constitutional means of furthering the anti-corruption rationale. *Id.* at 55-59.

Buckley's distinction between expenditure ceilings and contribution limits in candidate elections has remained intact.[13] Limitations on independent expenditures by PACs, *NC-PAC*, 470 U.S. at 496-97, and political parties, *Colo. Republican*, 116 S. Ct. at 2316-17, have been

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[13] There is one exception which is of no help to defendants. In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Supreme Court upheld state-imposed restrictions on expenditures made by corporations on behalf of candidates. The Court identified a compelling interest other than the anti-corruption rationale: "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas". *Id.* at 60. The basis for this holding hinges on the special and more limited nature of a *corporation's* First Amendment right to engage in political expression:

> [T]he mere fact that corporations may accumulate large amounts of wealth is not the justification [for the restriction]; rather, the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures. Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions. We therefore hold that the State has articulated a sufficiently compelling rationale to support is [sic] restriction on independent expenditures by corporations.

Id. at 660. The holding in *Austin* is limited to the political speech of corporations and has no relevance here.

struck down. The lack of tendency in such expenditures to corrupt or give the appearance of corruption led the *NC-PAC* court to conclude there was no constitutional justification to restrict independent expenditures by PACs. *NC-PAC*, 470 U.S. at 496-97. Moreover, the Court held that even if it were to determine that independent expenditures by PACs posed a threat of corruption or the appearance of corruption, the expenditure limitation would be a "fatally overbroad response to that evil." *Id.* at 498. In *Colorado Republican*, the Court underscored its previous holdings in this area before striking down independent expenditures by political parties: "We do not see how a Constitution that grants to individuals, *candidates*, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties." 116 S. Ct. at 2317 (emphasis supplied). A majority of the Court joined in holding independent expenditures immune from regulation as a matter of law.[14]

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[14] The Court was fractured on whether it should reach the question of the constitutionality of limitations on *coordinated* party expenditures. Justice Breyer declined to reach this issue. *Colo. Republican*, 116 S. Ct. at 2319-20. The Kennedy plurality found coordinated party expenditures indistinguishable from expenditures by a candidate or a candidate's committee. It reasoned that because the First Amendment does not permit regulation of the latter, it should not permit regulation of the former. *Id.* at 2323. Similarly, Justice Thomas would have reached the issue and struck down the limitation because "there is only a minimal threat of 'corruption,' as we have understood that term, when a political party spends to support its candidate or to oppose his competitor, whether or not that expenditure is made in concert with the candidate. . . . [The] heavy burden [of this regulation] on First Amendment rights is not justified by

3. Other Governmental Interests Supporting Campaign Finance Reform Are Insufficient To Justify Infringement Of First Amendment Freedoms

The *Buckley* court rejected two other governmental interests advanced by Congress as justification for spending caps. First, the Court held that the First Amendment will not countenance equalizing the financial resources of individuals and groups who wish to participate in the electoral process. *Buckley*, 424 U.S. at 48-49; 54; 56-57. Next, the Court rejected as illegitimate the government's interest in capping the exorbitant costs of political campaigns. *Id.* at 57.

Grounded on this legal landscape, we turn to the parties' arguments in defense of Ordinance 240-1995's limitation on campaign expenditures by candidates for city council.

B. *Buckley* And Its Progeny Cannot Be Distinguished And Are Controlling

1. Campaign Spending Does Not Implicate The Anti-Corruption Rationale

The City's main argument is that 20 years of experience has taught us that contribution limitations are not enough to address the problem of the corrupting influence of money in elections. In essence, the City argues that the *Buckley* court's empirical judgment was wrong. It

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the threat of corruption at which it is assertedly aimed." *Id.* at 2331.

cites to newspaper articles documenting the abuses in recent federal elections as proof of this contention.

> As has been demonstrated by the federal election experience over the past twenty-one years, large campaign donors, in a system of unlimited campaign spending, will often bundle their contributions, leading to undue influence on the electoral and legislative processes. Further, the fear that an opponent will spend vast sums of money in pursuit of a campaign victory has fueled a never-ending set of schemes to evade federal limits. During the most recent federal election, limits on contributions were rendered meaningless by the pressure of increasing levels of spending. The result was a campaign finance system characterized by monied interest contributions in the millions of dollars. Ruth Marcus & Charles Babcock, "The System Cracks under Weight of Cash; Candidates, Parties and Outside Interests Dropped a Record $2.7 Billion.," *The Washington Post*, February 9, 1997, at A1.

City Br. at 26-27; see also *id.* at 30-31 and 31 n.5 ("As recent events in this nation have shown, contribution limits, alone, will not protect the integrity of the electoral process.") (citing Dawn to Dark/Chasing the Dollars: One Day on the [Federal] Fundraising Trail, *The Boston Globe*, May 16, 1997, A1).

We are not unaware of the excesses of the federal campaign system. However, to the extent the City is relying on its interest in preventing real and perceived

quid pro quo corruption,[15] the Supreme Court's decisions in *Buckley, NC-PAC* and *Colorado Republican* clearly foreclose this argument as a matter of law. *Buckley* could be narrowly interpreted to say only that spending limits are unconstitutional because contribution limits are adequate to prevent corruption and the appearance of corruption. *See, e.g., Buckley,* 424 U.S. at 55 ("The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by [its] campaign expenditure ceilings."). This reading would leave open the question of what to do if contribution limits prove inadequate. However, *NC-PAC* and *Colorado Republican* make eminently clear that spending limits on PACs and political parties are unconstitutional not simply because of the presence of contribution limits but because they are not narrowly tailored to serve this interest. *NC-PAC,* 470 U.S. at 496-97; *Colo. Republican,* 116 S. Ct. at 2315-17. As the Court reasoned in *Colorado Republican,* "the lack of coordination between the candidate and the source of the expenditure [alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate and] . . . prevents us from assuming, absent convincing evidence to the contrary, that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption to the electoral system." 116 S. Ct. at 2316-17. *A fortiori,* the

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[15] The City loosely refers to "corruption" and does not clearly define the type of corruption the Ordinance was aimed at eliminating.

spending of money legally raised by candidates themselves poses no risk of quid pro quo corruption and campaign spending limits cannot be justified by the anti-corruption rationale.

Any argument that spending limits are necessary to reduce the incentive to circumvent the limits on contributions was expressly rejected by the *Buckley* court.

> [Our earlier discussion] explains why the Act's expenditure limitations impose far greater restraints on the freedom of speech and association than do its contribution limitations. The markedly greater burden on basic freedoms caused by [the expenditure limitations] thus cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations.

Buckley, 424 U.S. at 44.

Moreover, were we to consider the City's factual allegations, it has failed to present any evidence that spending limits are necessitated by the failure of contribution limits. The City had no experience with contribution limits at the local level at the time the spending limit was passed; contribution limits were not enacted until after the spending limit at issue here. As a result, the City has no evidence that contribution limits are inadequate to prevent actual and perceived quid pro quo corruption. The City mistakenly relies on the federal experience in national elections with contribution limitations to support its contention that they will inevitably prove inadequate at the local level. The problems uncovered on the federal level are explained primarily by the "soft-money"

loophole in contribution restrictions[16] and do not undermine the Supreme Court's conclusion that spending restrictions are not narrowly tailored to addressing the problem of the corrupting nature of money in politics.

Next, the parties argue that unlimited campaign spending is eroding the public's trust in city government and that pervasive cynicism is discouraging the public's participation in the democratic process. This is an outgrowth of the problems of actual and perceived quid pro quo corruption discussed at length above and of the inequalities of private economic power discussed below and therefore cannot provide constitutionally sufficient justification for campaign spending restrictions. We do not believe it can be severed as a "new" form of corruption the Supreme Court has not considered. Even if it could, as Kruse points out, it was advanced as a separate interest by the government in *Buckley*. See Kruse's Br. at 14 n.9 (interests advanced by the government as compelling include "the alienation from and disillusionment in the electoral process by this country's citizens") (quoting *Buckley v. Valeo*, 519 F.2d 821, 913 (D.C. Cir. 1975) (Tamm, J., concurring in part and dissenting in part)). While not separately addressed, the Supreme Court held that "[n]o governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by" the ceiling on campaign expenditures. *Buckley*, 424 U.S. at 55.

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[16] For an explanation of the problems with soft money in federal elections see Note, *Soft Money: The Current Rules and the Case for Reform*, 111 HARV. L. REV. 1323 (1998).

2. The Interest In Curbing The Rising Costs Of Campaigns Is An Insufficient Justification For Spending Limits

The Brennan Center as amicus argues that the Ordinance is supported by a compelling governmental interest not considered by the *Buckley* court: "combating the demonstrated corrosive effects on the democratic process of uncontrollable campaign spending." The Brennan Center and the States as amici focus on the inordinate amount of time candidates for office and officeholders are forced to spend raising adequate funds for office, which in turn fosters such a pervasive level of public cynicism that people are losing faith in American democracy and staying away from the polls. This argument is also answered by *Buckley*. The Court held that the interest in "reducing the allegedly skyrocketing costs of political campaigns" is not compelling or sufficient to justify restrictions on campaign spending. *Buckley*, 424 U.S. at 57.

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people – individually as citizens and candidates and collectively as associations and political committees – who must retain control over the quantity and range of debate on public issues in a political campaign.

Id. (footnote omitted). The need to spend a large amount of time fundraising is a direct outgrowth of the high costs of campaigns. However, because the government cannot constitutionally limit the cost of campaigns, the need to

spend time raising money, which admittedly detracts an officeholder from doing her job, cannot serve as a basis for limiting campaign spending.

3. The Interest In Leveling The Playing Field Is An Insufficient Justification For Spending Limits

The City initially concedes that *Buckley* rejected the governmental interest in "equalizing the financial resources of candidates" as a matter of law. City Br. at 18. The City then proceeds to urge this Court to adopt this very interest rejected by the Supreme Court as compelling justification for its campaign spending limit. It frames this interest in a number of ways: 1) candidates without access to wealth are excluded from the electoral process; 2) voters are deprived of a full slate of candidates because otherwise qualified individuals are excluded from running by cost-prohibitive campaigns; 3) voters are deprived of hearing candidates with lesser resources because wealthy candidates effectively drown them out; and 4) voters without access to wealth cannot be heard by candidates because they are drowned out by contributors with more money and influence.

These arguments, all concerning or stemming from the notion that the government has an interest in eliminating the advantage of wealth in the electoral process, or "leveling the playing field," are directly rebutted by *Buckley:*

> It is argued . . . that the . . . governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of

> elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by [the Act's] expenditure ceiling[s]. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.

Buckley, 424 U.S. at 48-49 (internal quotations and citations omitted). The Court reasoned further that spending limits "may fail to promote financial equality among candidates" and could instead serve only to protect incumbents and "handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." *Id.* at 54, 56-57. More fundamentally, the Court concluded that "the First Amendment simply cannot tolerate [the] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy" whether the source of his money is personal wealth or funds raised from legal contributions. *Id.* at 54.

The City and intervenor-defendant AASBC-PAC frame purportedly different interests as issues implicating the First Amendment rights of relatively poor voters

and candidates and the Equal Protection rights of relatively poor and minority voters and candidates. These alleged constitutional interests however are actually the same interest in leveling the playing field just described.[17]

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[17] Recently, the Ninth Circuit rejected similar challenges to the state of California's campaign finance system for judicial elections. *NAACP v. Jones*, 131 F.3d 1317 (9th Cir.1997). Plaintiffs argued that a "wealth primary" exists in Los Angeles County's system of electing judges which precludes candidates without access to wealth from running a meaningful campaign and which prevents voters without access to wealth from contributing effectively to a candidate in violation of voters' and candidates' rights under the First Amendment and the Equal Protection Clause. The court rejected the equal protection argument that all voters are entitled to the same access to the campaigning process regardless of wealth. "We refuse to attribute societal differences in income or the high cost of running a judicial campaign to the State. . . . The inability to influence other peoples' votes through campaign contributions is not equivalent to the inability to cast one's own vote. . . . [There is no right] to have equal access to the campaigning process." *Id.* at 1323-24.

The court also rejected plaintiffs' First Amendment argument. It held that the First Amendment rights of voters can be no greater than those of the speaker, i.e., the candidate. *Id.* at 1322. Because the court rejected plaintiffs' argument that candidates have a First Amendment right to public funding, *id.* at 1322, it rejected the voters' argument as well. "The First Amendment simply does not guarantee access to all of the information a voter would like to receive. . . . The 'wealth primary' does not burden any fundamental First Amendment rights." *Id.* at 1323.

The reliance of the City and AASBC-PAC on cases striking down *governmentally-imposed* barriers to participation in the electoral process in support of their argument that economic inequalities are unconstitutional is in obvious defiance of the Supreme Court's rejection of this very argument based upon the very cases relied upon by the parties.

> [T]he principles that underlie invalidation of governmentally imposed restrictions on the franchise do not justify governmentally imposed restrictions on political expression. Democracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues.

Id. at 49 n.55.

Again, even if we were to consider the facts in this case relating to alleged economic and racial disparity, the record does not bear out the parties' arguments. In its attempt to show that a meaningful campaign for city council can be run on $140,000 or less, the City factually undercuts its argument that candidates without access to wealth are excluded from the process and that voters are deprived of hearing from these very candidates. Four current councilmembers won by spending less than $140,000. Incumbent Tyrone Yates spent only $33,000 on a successful campaign and successful challenger Minette J. Cooper spent $97,000. These candidates relied upon direct voter contact and participation in candidate forums for communicating their political message to the electorate. The argument of intervenor-defendant AASBC-PAC is more puzzling. It argues that African American voters and candidates suffer a distortional effect as campaign

expenditures rise; their representation diminishes. AASBC-PAC Br. at 13. Race enters the calculus because the African American community "has less disposable income available to spend on a campaign." *Id.* at 16. However, African Americans hold 4 of the 9 council seats, which equates with its 40% representation in the City as a whole. Further, 2 successful African American candidates were among the top fundraisers in the 1995 election. The record fails to support the assertion that candidates without wealth and African Americans are excluded from meaningfully participating in Cincinnati city council elections.

4. Spending Limits Cannot Be Justified As A Reasonable Regulation of the Manner of Speech

As an alternative argument, the City contends that the Ordinance is justified as a reasonable regulation on the manner of speech in the election process of the sort recognized in *Kovacs v. Cooper,* 336 U.S. 77 (1949). The City makes this argument despite recognizing it was explicitly rejected in *Buckley:*

> Nor can the Act's contribution and expenditure limitations be sustained . . . by reference to the constitutional principles reflected in such decisions as . . . *Kovacs v. Cooper.* . . . The critical difference between this case and those time, place, and manner cases is that the present Act's contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties in addition to

> any reasonable time, place, and manner regulations otherwise imposed.

Buckley, 424 U.S. at 18 (internal citations omitted). The City cannot avoid binding precedent by merely criticizing it as "irrational."

III. CONCLUSION

The parties supporting the Ordinance have failed to advance any governmental interest outside of those interests considered and rejected as constitutionally insufficient by the *Buckley* court. Their arguments and Cincinnati's motivation for enacting this campaign spending limit have not gone unnoticed by dissenting members of the Supreme Court:

> Finally, I believe the Government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns. As Justice White pointed out in his opinion in *Buckley*, "money is not always equivalent to or used for speech, even in the context of political campaigns." 424 U.S. at 263 . . . (opinion concurring in part and dissenting in part). It is quite wrong to assume that the net effect of limits on contributions and expenditures – which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fundraising, and to diminish the importance of repetitive 30-second commercials – will be adverse to the interest in informed debate protected by the First Amendment. See *id.*, at 262-266.

Colo. Republican, 116 S. Ct. at 2332 (Stevens, J., dissenting). These views, however, have been rejected by a

majority of the Court. As this case is controlled by *Buckley* and its progeny, the decision of the District Court is AFFIRMED.

CONCURRING

COHN, District Judge, concurring.

I write separately to add these few words. It should be recognized that *Buckley v. Valeo*, 424 U.S. 1 (1976), was decided on a slender factual record. Similarly, although the City here attempted to develop a compelling factual record, it failed to do so.

Additionally, although the majority accurately states that "[t]he need to spend a large amount of time fundraising is a direct outgrowth of the high costs of campaigns," *supra* at 20, I believe the statement that "because the government cannot constitutionally limit the cost of campaigns, the need to spend time raising money, which admittedly detracts an officeholder from doing her job, cannot serve as a basis for limiting campaign spending," *id.*, goes too far given the factual record. There is an independent interest in freeing officeholders from the pressures of fundraising so they can perform their duties.[1] This interest is not encompassed by the prohibition on limiting the costs of campaigns. *Cf. Rosenstiel v.*

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[1] The Brennan Center notes that "[o]ne former Member of Congress estimated that during a campaign he and his staff spent 80% of their time fundraising." Brennan Center Br. at 11 (citing Jamin Raskin and John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 Colum. L.Rev. 1160, 1188 (1994)). Further, "[o]ne

Rodriguez, 101 F.3d 1544, 1553 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1820 (1997) (noting that with regard to a system of public campaign financing, "the State seeks to promote . . . a diminution in the time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and campaigning. It is well settled that [this] governmental interest [is] compelling.") (citing *Republican Nat'l Comm. v. Federal Election Comm'n*, 487 F. Supp. 280, 285 (S.D.N.Y.) (three-judge court), *aff'd mem.* 445 U.S. 955 (1980)); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (stating that when "the legislature has adopted a public funding alternative, the state possesses a valid interest in having candidates accept public financing because such programs . . . free candidates from the pressures of fundraising") (citing *Buckley*, 424 U.S. at 91). A determination of whether this interest is sufficiently compelling to justify campaign expenditure limits should be left for another day.

Similarly, it does not necessarily follow from the Supreme Court's rejection of the interest in limiting the high costs of campaigns that the interest in preserving faith in democracy is per se insufficient to justify the expenditure limits. Given the sparsity of the record, including the fact that the statistics advanced by the City

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political consultant has reported that even [President Clinton] has complained 'bitterly' at having to spend so much time fundraising, saying: 'I can't think. I can't act. I can't do anything but go to fundraisers and shake hands. You want me to issue executive orders; I can't focus on a thing but the next fundraiser.' " *Id.* at 12 (quoting Dick Morris, *Behind the Oval Office: Winning the Presidency in the Nineties* 150, 151 (1997)).

regarding public cynicism were compiled prior to the time the contribution limits and disclosure requirements of City Ordinance No. 336-1995[2] could have any real effect, we should refrain from commenting on whether the interest in preserving the faith of the citizens in our democracy is a mere outgrowth of the interest in limiting the high costs of campaigns.[3]

In sum, this is not the case to change the landscape of campaign finance. Put succinctly, the City lost because it failed to develop a compelling factual record and because it asserted the same arguments that were in no uncertain terms rejected by the Supreme Court in *Buckley*. The Supreme Court's decision in *Buckley*, however, is not a broad pronouncement declaring all campaign expenditure limits unconstitutional. It may be possible to develop a factual record to establish that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties, or the interest in preserving faith in our democracy, is compelling, and that campaign

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[2] In 1997 minor amendments were made to City Ordinance No. 336-1995. *See* City Ordinance No. 9-1997.

[3] The City's ordinance limiting contributions and requiring disclosure was enacted in November 1995, the same year the expenditure limit was enacted. The statistical data advanced by the City regarding the size of contributions and the potential for undue influence were compiled for the 1995 campaign. The public opinion research polls conducted on behalf of the City were undertaken in July 1996 and completed in December 1996. The contribution limits, therefore, did not affect fundraising during the 1995 city council campaign, and presumably did not significantly influence public opinion by December 1996.

expenditure limits are a narrowly tailored means of serving such an interest.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN R. KRUSE, et al.,

Plaintiffs

v. C-1-96-252

THE CITY OF CINCINNATI, et al.,

Defendants

ORDER

This matter is before the Court upon Plaintiffs' motion for summary judgment (Docs. 16; 22), Defendants' memorandum in opposition thereto (Doc. 38), and Plaintiffs' reply (Doc. 39), as well as an opposing memorandum filed on behalf of certain intervening parties. (Doc. 37).

In addition, Plaintiffs' motion to compel responses to certain discovery requests (Doc. 41) is pending before the Court. Defendants have opposed that motion as well. (Doc. 42).

At a hearing held in open court on January 31, 1997, counsel for Plaintiffs orally withdrew that portion of Plaintiffs' prayer for relief seeking a declaration of the unconstitutionality of, and thus enjoining enforcement of, limitations on Cincinnati City Council campaign contributions.[1] (*See* Amended Complaint, Doc. 3, pp. 13-14,

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[1] Plaintiffs' counsel orally represented on the record at the hearing that the inclusion of a reference to campaign **contributions**, as opposed to campaign **expenditures**, had been "inadvertent."

¶¶ B & C). Conceding that they were unprepared at that time to present evidence in support of Plaintiffs' additional request for compensatory damages (*see* Doc. 3, pp. 14, ¶ E), Plaintiffs' counsel orally consented to postponing a decision on that portion of Plaintiffs' prayer for relief as well. Counsel for all original parties and for intervening parties of record then were permitted to present arguments as to the remaining issues raised by Plaintiffs' amended complaint and motion for summary judgment. (*See* Docs. 3, 16).

At the conclusion of such hearing, the Court issued a oral decision on Plaintiffs' motion for summary judgment. This written order memorializes that decision for purposes of the docket.

IT THEREFORE IS ORDERED that Plaintiffs' request for a declaratory judgment and for injunctive relief with respect to limitations on Cincinnati City Council campaign contributions (Doc. 3, pp. 13-14, ¶¶ B & C) hereby is DISMISSED, having been voluntarily withdrawn by Plaintiffs. IT ALSO IS ORDERED that Plaintiffs' request for compensatory damages (Doc. 3, p. 14, ¶ E) hereby is administratively TERMINATED upon the docket of this Court, without prejudice to Plaintiffs' right to resubmission.

IT FURTHER IS ORDERED that Plaintiffs' motion for summary judgment (Doc. 16) hereby is GRANTED, in reliance upon *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612 (1976), as to all remaining claims contained in Plaintiffs' prayer for relief. (Doc. 3, pp. 13-15). Accordingly, the

Clerk of this Court hereby is DIRECTED to enter a declaratory judgment in favor of Plaintiffs and against Defendants, declaring Cincinnati City Ordinance No. 240-1995 § 115-3 to be unconstitutional on its face; to enter an order permanently enjoining enforcement of that provision of such ordinance, and to enter an order in favor of Plaintiffs for their attorney's fees, interest and costs incurred in conjunction with this matter, in an amount yet to be determined. Accordingly, Plaintiffs' motion to compel discovery (Doc. 41) hereby is DENIED, both as moot and on its merits.

Pursuant to Fed. R. Civ. P. 54(b), the Court further CERTIFIES that there is no just reason for delay, and that final judgment shall be entered hereon forthwith.

IT IS SO ORDERED.

/s/ Herman J. Weber
Herman J. Weber, Judge
United States District Court

[p. 1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN R. KRUSE, et al.,	CIVIL ACTION NO. C-1-96-252
Plaintiffs,	Cincinnati, Ohio
- v-	Friday, January 31, 1997
THE CITY OF CINCINNATI, et al.,	9:00 a.m. Hearing
Defendants.	**Motion for Summary Judgment**

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE HERMAN J. WEBER, JUDGE

TRANSCRIPT ORDERED: John C. Bonifaz, Esq.

APPEARANCES:

For the Plaintiffs: FINNEY, BACON & STAGNARO CO., LPA
BY: Christopher P. Finney, Esq
and David R. Langdon, Esq.
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For Deft. City: Mark S. Yurick, Esq.
Senior Assistant City Solicitor
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John C. Bonifaz, Esq.
Abigail Turner, Esq.
National Voting Rights Institute
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For Intervenor-Defts. African-American Small Business Committee, PAC, and Barbara Milon: COHEN, TODD, KITE & STANFORD
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[p. 2] 525 Vine Street
16th Floor
Cincinnati, Ohio 45202

For Intervenor-Defts. Charter Committee, Hamilton County Democratic Party and Matthew Rosen: BENESCH, FRIEDLANDER, COPLAN & ARONOFF
BY: Donald J. Mooney, Jr., esq.
2800 Cincinnati Commerce Center
600 Vine Street
Cincinnati, Ohio 45202

Also Present: Mrs. Bobbie Sterne
Todd Portune, Esq.
Michael D. Eagen, Esq. with the Ukraine Delegation, and
Other interested persons

Law Clerk: Susan Ferrell, Esq.

Courtroom Clerk: Elizabeth Brockmeier

Court Reporter: Mary Ann Ranz

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* * *

[p. 51] THE COURT: The Court wants to comment somewhat on the facts and on the matter. I don't

expect anyone to agree [p. 52] with anything the Court says. Certainly *some of you will* agree with some of the things, and some of you will not agree, and some of you will dispute things the Court says very legitimately and vociferously.

The first point that I want to make is that – the issue of whether the *Buckley* court had a factual finding before it, and I depend upon the opinion of the United States Supreme Court in this regard and I'm quoting from Page 10 of 424 U.S. – or I'm actually reading from the Supreme Court Reports, 96, Supreme Court Report at Page 630 and I'm quoting:

> "On remand, the District Judge entered a memorandum order adopting extensive findings of fact and transmitting the augmented record back to the Court of Appeals."

Now, under the instructions of the Federal Rules of Civil Procedure – and I don't know that we very often refer to this rule, but to me it may be the most important rule of the lot, and I'm reading Rule 1:

> "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy and inexpensive determination of every action."

[p. 53] This Court has dedicated itself, at least in this case, to attempt to follow that mandate of the rules to secure the parties the just, the speedy, and the inexpensive determination of the issues that are to be presented.

The parties have cooperated, and at the request of the Court the defendants have, at least it's my understanding, presented to the Court what they believe to be the facts and justifications for the ordinance, and the Court accepts those facts and statements as true. These facts and statements will be true throughout the course of the appeals in this case, and the Court believes that the defendants have been able to present these facts in a complete manner.

The Court determines that they're not, for the purposes of this hearing, disputed facts. The facts are all stipulated. Therefore, this Court has the duty of determining and interpreting those facts and applying the law as it exists.

Now, I've already alluded to one concern, and that is that – and that's Finding of Fact 1 where 18 candidates spent $2.33 million. This means that the average cost of campaigns – and I agree that one candidate paid 33,000 and one candidate paid two hundred and forty-some thousand and didn't receive election – but the average cost was a hundred and twenty-nine thousand four hundred and forty-four dollars and forty-four cents. That if we have more candidates [p. 54] running, say we had 18 in 1995 – say we have 20, then the cost of the election will be $2,800,000, if they all spend a hundred and forty thousand dollars as suggested.

The Court would find, therefore, that the hundred and forty thousand dollar limit should be more than reasonable for any Council election here in the City of Cincinnati. In fact, the Court believes that it is extremely high, but that's the Court personal opinion and it cannot

impose its personal opinion on the legislative body of the city or of the people of Cincinnati. The Court's personal opinion is absolutely irrelevant.

The Court accepts as true the Statements of Fact Number 34 to 37, and concludes that the people believe that what the Court would say "excessive contributions" made by certain individuals and corporations, or whoever here in Cincinnati, that money does corrupt the judgment of those that are recipients or benefactors of that money.

In Findings of Facts 15 through 29, the Court accepts that the contributions and – the people perceive that the contributions are corrupting the legislative process. In fact, specifically a Council person, who I hold in deep respect, specifically said, and this was in Finding of Fact 28, that large contributions expect a *quid pro quo*.

24 – well, that's – that's a different subject.

So, the Court believes without hesitation that these [p. 55] unusual contributions for a City Council election are detrimental to the election process.

However, in a well-reasoned opinion that this Court cannot take issue with, even if it disagreed with it, in the *Buckley* decision, the Supreme Court thought the problem through in a different context, albeit. But, advice given to us who labor here in the hinterlands is good advice, and that advice is that these evils must be addressed by limiting contributions and by having enforceable and reasonable and good reporting and disclosure requirements. This is a sensible and a perfectly constitutional approach to solving the problems that the City has

expressed in their Statements of Facts. Certainly, the facts stated in 1 through 11 can be addressed in this manner and should be addressed in this manner. This Court, through its personal experience – which again is not relevant, but we're all products of our environment and our past experiences – has had the opportunity to personally run in several elections, albeit they were of a judicial nature. But the pertinence of them is there were severe limitations, or at least apparently so, on the contributions that could be made. And the parties have cited cases, particularly the one out of the Northern District of Ohio, and the City Council relied on the Supreme Court's – or Ohio's approach to limiting contributions. And to me, the limiting of contributions forced a candidate to be [p. 56] more responsive and be a wider person in the sense of his experience – his or her experience – as they had to go to more and more and more participants in the political process to gain their contributions.

The unlimited spending may be an evil. The interesting point, there was an election, I believe, in Massachusetts where the two participants – and I do not remember it as I sit here whether it was for Senator, but it was, for an important elective office in Massachusetts, I believe, at least in the New England area, where the candidates themselves agreed and limited their spending voluntarily. Certainly, those who are interested in preserving the essence of our democracy would seem to be well-motivated enough to "voluntarily" eliminate – or limit their spending. This, of course, has not happened here in Cincinnati.

It seems incredible that the concern – the problem is, Cincinnati has been blessed by the energy and enterprise

of its people to accumulate great wealth. It's a most fortunate city and area from that respect. It has a rich and important and sometimes checkered political history, if you go back far enough – and this Court did in the *Clark versus the City of Cincinnati* case where it had to analyze the reasons for the emergence of the city manager form of government.

But, the evil, if there is an evil that wealth creates, can be constitutionally controlled by the limiting on [p. 57] contributions. Certainly, it seems like a terrible oppression on a person who may have personal wealth, who wishes to use that wealth advocating that person's own candidacy, to exclude such person from advocating his candidacy. And in this last Presidential, at least in the primary and in the general election, we have witnessed where individuals of wealth have been able to at least impact somewhat the election process.

The citations to the *Buckley* case have been reiterated into the record. The Court recognized that the limit – that the limitation on expenditures implicate fundamental First Amendment interests and that the expenditure ceiling imposes significantly more severe restrictions on protected freedoms of political expression and association than do its limits on financial contributions, and that is at page 23 of the Opinion.

In this case, it is clear that the City of Cincinnati, Ohio is challenging the United States Supreme Court's decision in *Buckley versus Valeo*. This is quite apparent. It's in Statement of Fact 24. It is in Mr. Portune's affidavit at Page 4, Exhibit 6, and there are other – other examples of them, but it specifically indicates that the City was

well aware of and felt the necessity of challenging the *Buckley – Buckley* ruling.

The City deserves some praise, in the Court's opinion, [p. 58] for basing this approach on what it considers to be new facts of its own in taking the lead in revisiting the Supreme Court's decision in *Buckley*. It is apparent that there is a dissatisfaction with the *Buckley* decision, as indicated in the holdings that have been accepted as facts in this case. But there again, the corruption and the impact or appearance of corruption can be best addressed under limiting contributions, strictly enforcing the contribution limit by enforcing any criminal laws that are designed to deter corruption and by reporting and disclosure requirements.

The Court notes that the ordinance specifically states that it is imposing a civil penalty rather than a criminal penalty. Counsel hasn't argued that, but it's what the ordinance says.

So, the fact it is imposing a civil penalty does have some significance, and the Court does count that as a – one of the distinguishing characteristics. But the penalty is still a penalty; it still deters and impacts free speech.

The civil penalty, by the way, I believe is six times the over – the over-expenditures, ten times – I'm sorry – ten times the amount of expenditures, so that the chilling effect is, indeed, very substantial.

The issue that this Court has been instructed to apply, or the rule of law that this Court is instructed to follow is that the constitutionality of this ordinance turns on whether [p. 59] the governmental interest advanced in

its support satisfies the exacting scrutiny applicable to limitations on core first amendment rights of political expression. *Buckley* at 44 and 45.

Considering that, the *Buckley* court stated:

> "The governmental interest in preventing corruption and the appearance of corruption is inadequate to justify ceilings on independent expenditures."

This is at 45.

Buckley court goes on:

> "The governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections."

It goes on to explain that . . .

> "The First Amendment protection cannot properly be made to depend on a person's financial ability to engage in public discussions." That's at page 49.

And then it simply says, "Limitations on expenditures is unconstitutional." Page 50.

> "The candidate, no less than any other person, has a First Amendment right to engage in the discussion. It is of particular importance that candidates have the unfettered opportunity to make their views known."

> "The ancillary interest in equalizing the relative financial resources of candidates competing for elective [p. 60] office provides the sole relevant rationale for expenditure ceiling." That's at 54.

The instruction of the Court is . . .

> "The First Amendment simply cannot tolerate restrictions upon the freedom of the candidate to speak without legislative limit on behalf of his own candidacy. Restrictions on a candidate's personal expenditures is unconstitutional;" 54.

The justifications of the arguments for the City have been alluded to as the six justifications: Preventing appearance of corruption; preventing actual corruption; equalizing the ability of all citizens to participate in elections and affect the choices available to them; opening the process to candidates less able to meet the prohibitive costs of election campaigns. Then the ones that the City maintains are new ones: Protecting the Equal Protection rights of all citizens – Cincinnati voters to participate on an equal and meaningful basis; protecting the First Amendment rights of all voters to be heard and to hear the information from all candidates.

The Court finds that these six positions, and particularly the two conditions that have been alleged as new, are simply a restatement of the first four that have already been decided in *Buckley* and that, therefore, they add no new reasons or materials for this Court to distinguish the [p. 61] case before it from the *Buckley* decision.

The City further argues it is only a reason – that the restriction is only a reasonable time, manner and place regulation. Those regulations may be upheld in certain circumstances. Certainly those cases have been argued in this court. They usually come before this Court around Christmastime.

(Laughter.)

THE COURT: But the *Buckley* court specifically rejected that as a premise and specifically distinguished the problem at hand from the *Kovacs versus Cooper* problem.

The fact that a candidate may have a great net worth or no net worth is a fact over which government has no control, that some of us have been favored in life, some of us have not been favored in life, all of us are equal and entitled to run for City Council, if we are so disposed to do so, without regard to our net worth.

The leveling of the playing field, if that be a desire, can constitutionally be done, if at all, by limiting the contributions to candidates.

The corruption and appearance of corruption – the appearance of corruption can be eliminated by the contribution limitations. The actual corruption can be eliminated by the criminal law and certainly by the electorate.

[p. 62] In all this, one must reflect upon what is the basic purpose of our First Amendment; what does it mean to each of us? It has been expanded and used – and some will say misused – on many occasions. This Court has heard cases where those arguments, pro and con, have been made. But to me, if the First Amendment means nothing else, it means that each of us has a right to express our political views freely and without limitations; that each of us has a right to practice our religion without interference from government; and that the press has the right to be free, independent and journalistic in watching

over the governmental process, and particularly the democratic process.

It would seem to this Court that the oversight of the press would guarantee that actual corruption will not occur here in the City of Cincinnati; that the oversight of the other council members will see that actual corruption does not appear here in Cincinnati. And if they fail, then the criminal justice system will see that corruption does not occur in the City Council of Cincinnati.

The Court disagrees with the City's position that *Buckley* created an irrational distinction when it rejected the *Kovacs* analysis.

The Court disagrees with the City's position that there are disputed facts in this case. The Court, in its investigation finds that the only courts that have spoken on [p. 63] the matter, that the courts have been very reluctant to limit expenditures of candidates and have only done so in a very unique and specific way. And in that case there was a corporation that limited the expenditures of a corporation, not an individual, and in the same case pointed out that the limitations of spending of a candidate would be considered improper.

In sum, the Court would find that accepting the Statement of Facts as true, that the evils expressed therein and the societal interests and the interests of the City of Cincinnati in limiting expenditures of candidates must be – cannot be distinguished from that of the *Buckley* situation, and that this Court is bound by its own judgment and by the theory of *stare decisis*, after considering the arguments of counsel, that the limits are unconstitutional.

The Court further finds that contribution limitations can effectively address each one of the issues that have been advanced as a societal interest and the legislative interest, and that the City has the obligation, if it so chooses, to refine and proceed to construct a constitutional ordinance limiting contributions.

The Court acknowledges that we, the City of Cincinnati, has been given the powers of Home Rule under Article 18 of the Ohio Constitution and has the right to regulate and control its own elections, as long as it does not infringe on [p. 64] acknowledged First Amendment rights of certain individuals.

The Court acknowledges that it is the will of the majority of the people of Cincinnati to impose spending limits on campaigns. The First Amendment was specifically designed to protect the First Amendment rights of political candidates, religious participants, the news media from the will of the majority if it would be the purpose of the majority to deny certain constitutional rights.

The Court acknowledges that the restrictions on the ballot access is to be decided, and this Court carefully examined that issue from the point of view of the City of Cincinnati in *Clark versus Cincinnati,* and it was determined that there was no restriction on access to running for Council imposed by the City on the availability or access to become a candidate. The fact that this is a field race rather than a one- or two- or three-party race is not persuasive to the Court.

In sum, again in sum, the Court will conclude and declare that Section 115-3, the expenditure limits contained in Ordinance number 240-1995 violates the Constitution of the United States and the First Amendment rights of candidates; that, therefore, the preliminary injunction issued in this case is made permanent; that this Court will administratively terminate the request for compensatory damages, and to be reinstated, if appropriate, upon reprimand from any appellate [p. 65] court. The Court will handle the other matters according to the law.

So that there can be no question about the intent of the Court, this Court, at this time, I will hear arguments as to whether there's any just cause to delay entry of final judgment and certifying this decision of the Court under Rule 54(b) to the Court of Appeals. I don't know of any.

* * *

97-3193/3194/3210

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN R. KRUSE, ET AL., Plaintiffs-Appellees, v. CITY OF CINCINNATI, ET AL., Defendants-Appellants (97-3194), CHARTER COMMITTEE OF GREATER CINCINNATI, ET AL., Intervenor-Defendants-Appellants (97-3193), AFRICAN-AMERICAN SMALL BUSINESS COMMITTEE, PAC, ET AL., Intervenor-Defendants-Appellants (97-3210).	ORDER (Filed June 18, 1998)

BEFORE: KENNEDY and SILER, Circuit Judges; and COHN,* District Judge

The court having received three petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing

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* Hon. Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

EMERGENCY

City of Cincinnati

An Ordinance No. 240

N.H.S.

-1995

AMENDING Title I of the Cincinnati Municipal Code by ordaining supplementary Chapter 115. Campaign Finance, to provide expenditure limits for campaigns for City Council.

WHEREAS, on May 3, 1994, the electors of the city of Cincinnati approved an amendment to the Charter of the city of Cincinnati which permits the City Council to pass legislation which differs from state law in the area of campaign financing, campaign contributions and campaign expenditures; and

WHEREAS, it is the sense of Council that limitations on campaign expenditures are the most effective means of promoting meaningful campaign reform; now, therefore,

BE IT ORDAINED by the Council of the city of Cincinnati, state of Ohio:

Section 1. That Chapter 115 of Title I of the Cincinnati Municipal Code is hereby ordained to read as follows:

CHAPTER 115

CAMPAIGN FINANCE

Section 115-1. Definitions.

For the purposes of this chapter the words and phrases defined herein shall have the meanings ascribed to them in Title 35. Elections, of the Ohio Revised Code or, unless another meaning is ascribed to them in this chapter. Provisions of the Ohio Revised Code otherwise applicable to the provisions of this chapter which have been altered by the provisions of Amended Substitute Senate Bill 8, signed by the Governor of the State of Ohio on May 24, 1995 shall be incorporated herein upon the effective date of this ordinance, whether or not the provisions of that bill have taken effect.

Section 115-1-E. Election Cycle.

"Election cycle" shall mean that two year period commencing on December 1 next following a regular municipal election held on the first Tuesday after the first Monday in November and extending through November 30 next following a [sic] the next subsequent regular municipal election.

Section 115-1-E1. Expenditure.

"Expenditure" means the disbursement or use of either a contribution or personal funds of a candidate for the council or his or her immediate family on behalf of or for the benefit of the candidate for the purpose of advocating his or her election to the council or the defeat of his or her opponent. "Expenditure" does not include an independent expenditure, uncompensated

volunteer services, or slate cards, sample ballots, or other publications of a political party that identify all of the candidates endorsed by the party in an election.

Section 115-1-I. Immediate Family.

"Immediate family" shall mean the candidate, the candidate's spouse, parents, children, sons-in-law, daughters-in-law, brothers, sisters, grandparents, mother-in-law, father-in-law, brothers-in-law, sisters-in-law, or grandparents by marriage.

Sec. 115-3. Expenditure Limits.

The total amount of expenditures made in the election cycle by a candidate or the campaign committee of a candidate for the council shall not exceed three times the annual compensation provided for the office to which a candidate seeks election.

Sec. 115-5. Reporting requirements.

All reports filed by any candidate for the council with the election authorities of the State or the Hamilton County Board of Elections shall also be filed with the Clerk of Council and the Office of Contract compliance and investigations.

Sec. 115-7. Rules; Investigations.

The director of the office of contract compliance and investigations shall adopt rules necessary for the administration and enforcement of the provisions of this chapter.

The director of the office of contract compliance and investigations shall review all reports filed with the clerk of council under the provisions of

this chapter for compliance with this chapter and shall investigate any matters which vilolate any of the provisions of this chapter.

Upon presentation to the director of the office of contract compliance and investigations of a sworn affidavit of any person, made on personal knowledge, setting forth any violation of the provisions of this chapter the director shall proceed to investigate the charges made in the affidavit.

If the director of the office of contract compliance and investigations finds a violation the director shall impose a civil fine in accordance with the schedule of fines contained in this chapter, the imposition of which shall be subject to appeal under the provisions of Section 119.12 O.R.C. Any fines collected under the provisions of this chapter shall be deposited in the General Fund of the city of Cincinnati.

If the director of the office of contract compliance and investigations finds, after investigation of an allegation of failure to comply, that a violation has not occurred the director shall prepare a report of those findings which shall be kept on file in the office of contract compliance and investigations for a period of one year.

Sec. 115-99. Penalties.

The candidate of any campaign committee that expends funds in violation of the provisions of this chapter shall be fined an amount equal to ten (10) times the amount of excess expenditures over permitted expenditures.

Failure to file any report required under the provisions of Section 115-5 hereof shall be cause

for the imposition of a fine of $200.00 dollars per day per report for each day of violation.

Section 2. The provisions of the laws of the state of Ohio pertaining to campaign financing, campaign contributions and campaign expenditures that are not inconsistent with the provisions of this chapter shall remain in full force and effect and shall apply in addition to the requirements of this chapter. In the event of a conflict between the provisions of the laws of the state of Ohio and the provisions of this chapter, the provisions of this chapter shall control.

Section 3. This ordinance shall be in force and take effect from and after the earliest period allowed by law.

Passed July 6 A.D., 1995

/s/ Roxanne Qualls
Mayor

Attest /s/ Sandy L. Sherman
Clerk

I HEREBY CERTIFY THAT ORDINANCE NO. 240 1995 WAS PUBLISHED IN THE CITY BULLETIN IN ACCORDANCE WITH THE CHARTER ON 7-18-59.

/s/ Sandy L. Sherman
Clerk of Council